NULLITY OF MARRIAGE.

WHETHER marriage is looked upon as a contract or as an institution or as a status, it is perhaps the most important of all conditions in civilized communities. It is created by the contract of the parties, and continues during their joint lives. But from the time the marriage ceremony is performed they have no power by mutual consent to dissolve it. From that time the public alone by legislative act or judicial decree can put an end to it. Public interest and public morality alike demand that we shall never permit any loosening of the marriage tie, save in extreme cases when grievous wrong is done to innocent persons. It is of the gravest public concern that the marriage should be permanent. That the origin of such concern is traceable to the teachings of the Church is important only as it serves to impress upon the people of the community the necessity of such permanence.

The parties to a marriage take each other for better or worse. Neither can complain if the other becomes mentally or physically affected or incapacitated. Again, from the moment the marriage is entered into, the parties are disqualified from contracting with each other, and this disqualification lasts as long as the marriage continues. The property rights of the parties become fixed by the marriage. The husband acquires rights in the wife's estate, real and personal, and she in his. Their rights to make effective wills are abridged. While these property rights may be affected in whole or in part by mutual consent they serve to illustrate the change which marriage works in the condition of the parties. Again, the parties acquire legal relations toward each other. Among these may be mentioned the right of the husband to the services of his wife, the right of the wife to be supported by the husband. These rights and duties arise from the necessity of the case. The public interests require that such should be the accompaniments of the conditions in which the parties are placed by marriage.

But there is an overwhelming reason why the community should not permit married persons to change their legal status. National, state, and local rights and duties are created by marriage. The

public, that is to say, the sovereign nation or state, in emergencies, has the right to the services and even to the lives of its citizens. It has a solicitous care for them. It provides for their education, health, needs, and comfort. Burdens of weight are imposed upon communities. Therefore the public comprising the nation, state, or municipality, as the case may be, has such an interest in the offspring of marriage as to give it the right to say that the conditions created by the marriage shall not be changed save by its consent.

Acts of legislatures and judgments of courts abound in evidences of the zealous care which the public exercises over children.[1] They belong no less to the public than to the parent. It has ever been slow to give consent to any change in the marriage condition, and always has insisted upon the strongest reasons before allowing the parties to alter the situation in which they are placed when they marry.

Sound public policy furnishes us the true guide in determining what shall be a sufficient reason for dissolving marriage. Unfortunately cases arise where a continuance of the marriage relation would be a positive injury to the public as well as to the private interest. Wrongs offending the moral sense of the community are repeated until these come to be recognized as well defined grounds for dissolution of marriage. While it is for the legislature to prescribe what shall be sufficient grounds, the courts in rare instances say what in addition to the legislative grounds may suffice to dissolve marriage.

Divorce is the ordinary way of terminating the marriage condition. The grounds are few, and with the exception of a limited number allowed in a very few of our states, beyond criticism. The ease with which divorces are obtained in some states is to be explained in great measure by the looseness of the procedure. In such states it generally will be found that no provision is made whereby the honesty of the proceedings is guarded. There is no department in the administration of the law where there is more danger of deception being practised upon the court. The temptation is almost irresistible for the parties where married life has become to them well-nigh insupportable, to exaggerate, if nothing more, in their testimony. When the suit is contested there is

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[1] See Park *v.* Barron, 20 Ga. 702, where the court went very far to save the legitimacy of children.

some safeguard for the public interests. But when there is no trial between the parties — when the suit is uncontested — the situation is peculiarly adapted to lead the libellant to testify to enough to procure the divorce. There is no check. The Court knows, and can know, nothing of the parties or the circumstances of the case, except what is disclosed at the hearing. Many judges feel at times that possibly they are imposed upon to a greater or less extent, and make strenuous efforts to get at the real situation. But the procedure in divorce is inadequate. It is strange that in a matter where the public has so great interest there should be no safeguards provided.

Cases occur where divorce will not give a sufficient remedy for the wrong done. These cases demand a more radical treatment. The injury is such as to require an annulment, that is, an entire destruction of the marriage *ab initio*. It will be seen at once that the effects of annulling a marriage are far more serious than the results of divorcing the parties. The decree of divorce presupposes a legal marriage. The decree, or sentence, of nullity says that there was no marriage. If the public has a great interest in divorce, how deep is its concern in nullity.

It is not surprising, therefore, that legislatures and courts have been slow to administer this remedy and have restricted the grounds for nullity so that they are very few in number. The personal relations and the property rights of the parties are entirely changed by a decree of nullity. But the gravest effect of such decree is that it renders children illegitimate. Legislatures have provided for the legitimacy of children and have furnished a remedy for some of the evils arising from the decree. But long before the enactment of such provisions the decrees of nullity were followed by all their harsh consequences.

In order to examine properly the grounds and reasons which compel the courts to grant the decrees we should keep in mind the distinction between void and voidable marriages. This distinction has been well defined as follows: —

"The difference between void and voidable is so clear that no person who ever looked into any elementary book on the subject is ignorant of it. The canonical disabilities, such as consanguinity, affinity, and certain corporal infirmities, only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained; and such marriages are esteemed valid unto all civil purposes, unless such sentence is actually declared during the lifetime of the parties. Civil disabili-

ties such as prior marriage, want of age, idiocy, and the like, make the contract void *ab initio* — not merely voidable: these do not dissolve a contract already made, but they render the parties incapable of contracting at all: they do not put asunder those who are joined together but they previously hinder the junction; and if any person under these legal incapacities come together, it is a meretricious, and not a matrimonial union; and therefore no sentence of avoidance is necessary." [1]

This distinction has sometimes been lost sight of, with resulting confusion.

A voidable marriage is valid until avoided by a decree obtained at the suit of one of the parties thereto, and consequently cannot be attacked in collateral proceedings.[2] A void marriage is invalid *ab initio*. No decree is necessary to establish the invalidity.[3] It may be disputed in any proceedings, direct or indirect. The legal situation in the case of a void marriage is therefore plain and needs no further comment.

But perplexing questions arise in suits for the annulment of voidable marriages. Causes well recognized by the law are consanguinity, affinity, impotence, and want of consent, including mistake as to persons, duress, and fraud. The two latter, especially fraud, in their very nature are calculated to cause difficulty and confusion. The marriage condition is created by the voluntary consent of the parties. Without such consent there is no marriage. It follows then that where consent is obtained by duress or fraud the party may have relief if he takes prompt action on being free from the constraint or after discovering the fraud. It is manifestly against public policy that relief should be given if the parties after the duress has ceased or after the fraud has been discovered voluntarily continue cohabitation. In such case they acquiesce in or ratify the wrong. The law as to duress can now be considered as settled, and we may therefore confine our attention to the subject of fraud.

To define the kind of fraud which will lead the courts to relieve the innocent party is a matter of some difficulty. When the causes were tried in the ecclesiastical courts in which the jurisdiction was originally vested, there was little confusion. But

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[1] Elliott *v.* Gurr, 2 Phillim. 16.

[2] See Ridgely *v.* Ridgely, 79 Md. 298; McKinney *v.* Clarke, 2 Swan, 321.

[3] Although a decree of nullity in a case of void marriage is unnecessary, yet the courts many times are asked to grant such decrees. It is wise to take such proceedings when both parties are living and when evidence is easily obtainable. The decree is a matter of record and conclusively establishes the invalidity of the marriage.

when the temporal courts undertook to deal with the subject of nullity they were troubled. Fraud was a well-known — a traditional — ground for relief in equity. In some of our States the equity courts assumed jurisdiction on that ground.[1] It is believed that no common law court ever undertook to grant nullity of marriage, although courts at law in dealing with actions recognized fraud as an important element. In England since 1857 jurisdiction over dissolution of marriage has been in the courts provided by acts of Parliament. In this country, although the courts of some states assumed jurisdiction in equity, jurisdiction has generally been conferred by the legislatures. But whether jurisdiction was conferred or assumed the courts have had to define the kind of fraud which would suffice to annul the marriage. Instinctively they sought something which would accord with the methods of reasoning they had been accustomed to adopt. The English courts, succeeding the ecclesiastical courts, followed closely the ecclesiastical decrees. But whether by force of legal habit or whether from some other cause, the court in its reasoning in a case[2] which arose some years ago treated marriage as if it were an ordinary contract. The case will be referred to hereafter.

A passage from Ayliffe's Parergon seems to have been considered so late as 1897[3] as a reliable statement of the ecclesiastical law. It is as follows:

"Matrimony ought to be contracted with the utmost freedom and liberty of consent imaginable, without fear of any person whatsoever; for matrimony contracted through any menace or impression of fear is null and void *ipso jure;* . . . for marriages contracted against the will of either of the parties are usually attended with very bad and dismal consequences. . . . And though there is nothing more contrary to consent than error, yet every error does not exclude consent. Wherefore I shall here consider what kind of error it is, according to the canon law, that hinders or impeaches a matrimonial consent and renders it null and void *ab initio.*

"Now there are four species of error, which are hereunto referred. The first is styled *error personae,* as when I have thoughts of marrying Ursula; yet by my mistake of the person I have married Isabella. For an error

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[1] Wightman *v.* Wightman, 4 Johns. Ch. 343; Burtis *v.* Burtis, Hopk. 557; Carris *v.* Carris, 9 C. E. Green, 516; Henneger *v.* Lomas, 145 Ind. 287. *Contra,* Mattison *v.* Mattison, 1 Strobh. Eq. 387.

[2] Scott *v.* Sebright, 12 P. D. 21.

[3] Moss *v.* Moss, [1897] P. 263.

of this kind is not only an impediment to a marriage contract, but it even dissolves the contract itself, through a defect of consent in the person contracting. For deceit is oftentimes wont to intervene in this case; which ought not to be of any advantage to the person contracting. A second species is styled an error of condition.[1] . . .

"The third species is what we call *error fortunae;* and is when I think to marry a rich wife and in truth have contracted matrimony with a poor one. But this error does not, even by the canon law, dissolve a marriage contract made simply and without any condition subsisting. . . . The last species is stiled an error of quality, viz., when a person is mistaken in respect of the others quality, with whom he or she contracts. As when a man marries Berta believing her to be a chaste virgin, or of a noble family and the like, and afterwards finds her to be a person deflowered or of a mean parentage. But according to the common opinion of the doctors this does not render the marriage invalid; because matrimony celebrated under such kind of error, in point of consent, is deemed to be simply voluntary as to the nature and substance of it, though in respect of the accidents 't is not voluntary."

From this it will be seen that the effect of deceit or fraud in nullity of marriage is far more limited than in the case of ordinary contracts. The language of Butt, President, in Scott *v.* Sebright[2] seems to indicate that the same rule of law applies in both cases. This was a petition for nullity of marriage on the ground of duress and false representations. The language is as follows: —

"The courts of law have always refused to recognize as binding contracts to which the consent of either party has been obtained by fraud or duress, and the validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract.

This statement might well have been accepted as an authority for treating fraud in nullity suits as in ordinary actions at law, if it had not been commented on and explained in the later case of Moss *v.* Moss,[3] where the President said of the language above quoted:

"Standing by themselves, these words may appear capable of a wider effect than any other English authority of which I am aware would warrant. But read in connection with the facts before the court, which showed a case of deception and force acting on a weakened mind, they

[1] Recognized by Ayliffe as obsolete.
[2] 12 P. D. at p. 23.
[3] [1897] P. at p. 271.

do not appear to me to go further than to lay down that in the case of marriage, as in the case of other contracts, fraud and duress may be so employed as to render an apparent consent in truth no consent at all.

So that the language of the court in Scott *v.* Sebright is now to be understood as simply declaring that if the nature of the fraud is sufficient to satisfy the requirements of the divorce courts, it will lead them to declare a marriage null in the same way in which fraud will lead the courts to declare a contract void.

But what is the nature of the fraud which will lead the divorce courts to such action? Will they interfere when the fraud is based upon representations as to moral qualities or physical conditions? The English courts, in the case of Moss *v.* Moss,[1] have declined so to do. This was a petition for nullity of marriage on the ground of fraud. The respondent, at the time of her marriage with the petitioner, was pregnant by another man, and concealed her condition from the petitioner, who, on discovering her condition, ceased all relations with her. The court dismissed the petition. The President, Sir Francis H. Jeune, delivered the opinion of the Court. He said, in part: —

"In the case of Swift *v.* Kelly,[2] decided in 1835, the Judicial Committee of the Privy Council Lord Brougham, Baron Parke, and Shadwell, V. C., being members of the Board, expressed its opinion in the following terms: 'It should seem, indeed, to be the general law of all countries, as it certainly is of England, that unless there be some positive provision of statute law, requiring certain things to be done in a specified manner, no marriage shall be held void merely upon proof that it had been contracted upon false representations, and that but for such contrivances consent never would have been obtained. Unless the party imposed upon has been deceived as to the person, and thus has given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made.' It is not necessary to inquire how far the law of other countries may be supposed at that time to have been the same as that of this country; but I think that the above words, unqualified as they are, do represent with substantial accuracy the law of England; . . . Excepting for the moment such fraudulent concealment or misrepresentation as is alleged in the present case, no fraudulent concealment or misrepresentation enables the defrauded party who has consented to it to rescind it. . . .

"The result is that the English law of the validity of marriage is clearly defined. There must be the voluntary consent of both parties. . . .

[1] [1897] P. 263.

[2] 3 Knapp, 257 at 293.

It has been repeatedly stated that a marriage may be declared null on the ground of fraud or duress. But, on examination, it will be found that this is only a way of amplifying the proposition long ago laid down in Fulwood's Case,[1] that the voluntary consent of the parties is required. In the case of duress with regard to the marriage contract, as with regard to any other, it is obvious that there is an absence of a consenting will. But when in English law fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent. . . . The principles thus long and uniformly asserted by the English courts, and the very fact that the point has never been raised, appear to me to be so conclusive on the present question that, even if it could be shown that authority to the contrary could be found in the canon law, I should say that that authority has not been accepted in this country. But as a fact I think that the principles above indicated may be traced back to the canon law. . . .

"The decisions in the American courts on which the learned counsel for the petitioner places his main reliance do no doubt cover the present case, and the more important of them are, I think, decisions professing to be based on the same principles that we recognized. Speaking with all respect, these courts have, in my opinion, introduced a novelty into the law common to the two countries, and have broken in on the principle that the only fraud which annuls a marriage is that which renders the mind of one of the parties not a truly consenting mind. They repudiate equally with English tribunals the idea that any other fraudulent representation vitiates a marriage; but they lay down that there is one fraudulent representation, or fraudulent concealment which renders a marriage void, and that is the representation or concealment by which a woman induces one man to marry her when she is pregnant by another."

He then examined the decisions of some of our courts, and said prophetically: —

"I refer to these cases chiefly to show that it has been felt that even the comparatively narrow principle that a marriage is voidable by pregnancy of the wife at the time of it by a man other than her husband must receive still further limitations. I venture to think that such limitations could not stop at the point indicated by the above decisions. What would be said if the husband did not become aware of his wife's pregnancy at marriage for a long time after it, and perhaps after the birth of legitimate children, as well might happen if a sailor left his wife for a voyage soon after marriage, and before his return there was a miscarriage

[1] (1638) Cro. Car. 482, 488, 493.

or the child died? Could he many years after annul the marriage? It is difficult to see why not, if he had no means previously of discovering the truth. Could he bastardize his children? It is also difficult to see why not, unless some further refinement be introduced into the law. My belief is, that to assent to the proposition for which the petitioner contends would be to introduce into a law which now is, and beyond question should be, and be believed to be, certain, a new principle not resting on any sound basis, and, develop as it must in several directions, sure to give rise to many doubts and much confusion."

It can then be said that the rule in England is that no representations as to moral qualities or as to physical conditions are deemed to be material.

The rule in this country is somewhat different. While there must be the substance of consent, the courts have extended the rule as to fraudulent representations so as to include some of those which concern the physical conditions of the parties to the marriage. The leading case is Reynolds *v.* Reynolds.[1] The libel, which was for nullity, set forth that the libellee before marriage falsely represented that she was chaste and virtuous; that she was not virtuous, but at the time of the marriage was pregnant by another man; that at the time of the marriage he was ignorant of her condition, and that he ceased all intercourse with her after discovering her condition. The libellee demurred. The Court overruled the demurrer. The opinion was by Bigelow, C. J., who treated the subject of fraud as applicable to marriage at some length. The opinion dealt with marriage as a contract, but one to be construed with due regard to a wise and sound policy, and stated that the great object of marriage is to secure permanence of family relations and legitimacy of offspring; that fraudulent representations concerning the moral character, personal condition, fortune, health, or temper afford no ground for relief after the marriage is entered into; that such matters are not essential or material to the contract; that the parties are put upon reasonable inquiry as to such qualities; that while such representations would furnish good grounds for refusing to enforce the executory contract, they would not be deemed sufficient to affect the contract of marriage when executed; that the condition of pregnancy by another man is material and sufficient, for it prevents the woman from making or executing the contract of marriage; that although the man is put on

[1] 3 Allen, 605.

his inquiry as to the woman's qualities above mentioned he is not bound to inquire as to whether she is pregnant, for such condition "cannot be ascertained by any of the ordinary means of personal intercourse, or by careful and diligent inquiry;" that as the husband is presumed to be the father of children born after the marriage, in case the marriage be not decreed void, he would be burdened with offspring not his own, or if he chose to rebut the presumption by legal proceedings, he would be forced to make public the shame of his wife, and thereby disturb the harmony of the domestic relations.

Touching the reason advanced by the Court to the effect that the woman while pregnant is incapacitated from making and executing the contract, it may be said that plainly pregnancy does not prevent her making the contract, — and here the learned Chief Justice seems for the moment to have lost sight of the important distinction between the executory contract to marry and the executed contract of marriage, — and that while it may be that she is not at the time capable of executing the contract,[1] the disability is but temporary. A mere temporary disability arising from disease or other cause is not sufficient to annul a marriage. And so far as a person being put on his inquiry is urged as a reason, it would seem to apply in the case of pregnancy as well as in the case of unchastity. Again, when the Court urges the reason that there is a presumption of law that a child born during coverture is the child of the father, the answer is obvious, — indeed, it is anticipated by the Court, — such presumption may be rebutted by the same evidence which will suffice to establish the grounds for nullity. So when the feelings of the parties are considered, the shame and mortification will be equally great whether the proceeding is to annul the marriage or to rebut the presumption of paternity.

But it is harsh indeed to insist that the husband shall accept the paternity of the child or publish the shame of his wife to the world, and at the same time to require that the marriage condition shall continue. Such a course would in all likelihood be disastrous to the relations between the husband and the wife. In this the public is concerned.

As the grounds of the decision in Reynolds *v.* Reynolds are examined, it will be found that they rest upon considerations of sound public policy which are difficult to answer.

[1] In Franke *v.* Franke, (Cal. 1892), 31 Pac. Rep. 571, it was held that pregnancy did not constitute physical incapacity.

Carris *v.* Carris[1] was a nullity suit. The grounds were similar to those in Reynolds *v.* Reynolds.[2] Bedle, J., gave the opinion of the Court. He said in part:

"This is a delicate question, for the relation is peculiar, and not like other contracts, which may be dissolved by the mere act of the parties. Most serious considerations of public policy and good morals affect it, and demand that it should be indissoluble, except for the gravest causes. The mere presence of fraud in the contract is not sufficient to dissolve it. The fraud must exist alone in the common law essentials of it, and then not to have the effect of avoiding it against sound considerations of public policy. . . . In granting relief, courts should always be careful that no violence is done to the nature of the relation and to sound morals. It must be extraordinary fraud alone that will justify an avoidance of the bond. The fraud charged in this case is extraordinary, peculiar, and of the most flagrant character, entering into the very essence of the contract. . . ."

These cases suffice to show that the true reason for the interference of the Court is based not upon fraud as between the parties, but upon conditions affecting the public. It is not always entirely safe to make use of analogy. However, it may be remembered that private contracts will not be enforced where the consideration is the commission of or refraining from committing or a promise to commit or to refrain from committing a crime or tort. For a promise to commit or the commission of a crime or tort tends to bring about conditions detrimental to the public welfare.

The decisions in this country are generally in accord with Reynolds *v.* Reynolds.[3]

The rule once established that fraudulent representations concerning the physical condition of the party may furnish sufficient ground for nullity, it was inevitable that in time the courts would

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[1] 9 C. E. Green, 516.

[2] 3 Allen, 605.

[3] Barden *v.* Barden, 3 Dev. 548; Morris *v.* Morris, Wright (Oh.), 630; Scott *v.* Shufeldt, 5 Paige, 43; Ritter *v.* Ritter, 5 Blackf. 81; Baker *v.* Baker, 13 Cal. 87; Carris *v.* Carris, 9 C. E. Green, 516; Sissung *v.* Sissung, 65 Mich. 168; Harrison *v.* Harrison, 94 Mich. 559; Caton *v.* Caton, 6 Mackey, 309. *Contra*, Scroggins *v.* Scroggins, 3 Dev. 535.

In Foss *v.* Foss, 12 Allen, 26, the libellant had had intercourse with the libellee before the marriage. The libellee was pregnant by another man. Nullity was refused. Bigelow, C. J., said the libellant had reasonable notice. Considerations of public morality governed the case. Crehore *v.* Crehore, 97 Mass. 330, follows Foss *v.* Foss. See Franke *v.* Franke (Cal.), 31 Pac. Rep. 571.

be asked to extend the application of the rule.[1] In Smith *v.* Smith,[2] the libellee was afflicted with a venereal disease which was probably incurable. The court held that the fraudulent concealment of the existence of the disease was sufficient to annul the marriage. The court, however, showed great reluctance in extending the application of the rule established by Reynolds *v.* Reynolds. Knowlton, J., in the course of an able and careful opinion pointed out with great clearness the distinction between the rights of the parties arising from an executory contract to marry and the status created by the executed contract of marriage, and the difference between the kind and degree of fraud in either case necessary to make the contract voidable. The fact that the libellee was in such condition as to be utterly unfit for matrimony, and the hardship of continuing the marriage relations were treated as of consequence. The binding authority of Reynolds *v.* Reynolds was recognized. But considerations of public policy were plainly felt to be the controlling reasons for the conclusion reached.

It is plain that the court did not intend to lay down any general rule with reference to cases of fraudulent representations concerning physical condition. Yet it is more than likely that cases will arise in which the courts will be asked to annul marriage on grounds similar to those in Smith *v.* Smith. Leprosy certainly renders one unfit for matrimony. It is well known that persons afflicted with this disease are separated from their fellow men. There are forms of tuberculosis which render a person unfit for matrimony, which are infectious, dangerous, and incurable and which are transmitted to offspring. They are of as serious character as the disease in Smith *v.* Smith.

In that case stress was laid upon the fact that the marriage had not been consummated. Bishop in his exhaustive treatise on Marriage, Divorce, and Separation repeatedly calls attention to the legal effect of consummation of marriage.[3] But should it prevent annulment in all cases? Non-consummation is not a ground for dissolution of marriage. *Consensus, non concubitus facit matrimonium.* The rights and burdens of the parties, of third persons, and of the community are fixed when the marriage ceremony is

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[1] In Ryder *v.* Ryder, 66 Vt. 158, and Anon., 49 N. Y. Supp. 331, the libellees were afflicted with chronic and contagious venereal diseases. Nullity was decreed in each case.

[2] 171 Mass. 404.

[3] Secs. 316, 331–364, 456–464.

performed. It is true that the courts in some cases have said that consummation would be a bar to nullity.[1] But an examination of the cases will show the true rule of the decisions to be that where the consummation has occurred after the injured party has discovered the fraud or wrong, — that is, when there has been an acquiescence or ratification, — or when there is a possibility of children, the decree will be denied. Plainly acquiescence and ratification should have this effect. The possibility of offspring is the strongest reason for refusing annulment. But in cases in which this possibility ceases to exist, the American rule as to fraudulent representations concerning physical condition may safely be applied. If one of the parties after consummation of the marriage discovers the fraud, and thereupon separates from the other for a length of time sufficient to determine that there will be no child born of the marriage, is it for the public interest to say that the marriage condition shall continue?[2] It is difficult to see how the public will be affected injuriously by annulment in such case.

With the exception of fraud the legal grounds for dissolution of marriage give little reason to apprehend any serious danger to the permanency of the marriage status. As before stated, the causes for divorce and nullity are few and, saving fraud, sufficiently defined. When fraud is the ground for annulment, the danger to be feared is that the American rule may be unduly extended.[3] If, however, it is carefully applied, the public interests will be helped rather than harmed.

When we compare the English and American rules with reference to fraud it will be seen that both have advantages and disadvantages. The English rule is simple, readily understood, and easily applied. But in some cases it works hardship.[4] The

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[1] Lyndon *v.* Lyndon, 69 Ill. 43; Robertson *v.* Cole, 12 Tex. 356. In these cases the libellants were 15 years of age. They were enticed away and persuaded by means of fraudulent representations to go through the form of marriage, and were returned to their parents directly after the ceremony. The marriage was repudiated immediately. Consummation would clearly have operated as acquiescence or ratification.

[2] See Ryder *v.* Ryder, 66 Vt. 158, and Anon., 49 N. Y. Supp. 331.

[3] In Ryder *v.* Ryder, 66 Vt. 158, the parties cohabited for more than a year after the libellee discovered the libellee's condition. This case goes to the danger point, if not beyond.

[4] Sir Francis H. Jeune in Moss *v.* Moss, [1897] P. p. 278, at the close of his opinion said: "I am sorry for the undeserved misfortune of the petitioner, but the petition must be dismissed."

American rule is not so simple, and is difficult of application. But it has the great advantage of affording relief in cases of exceeding hardship. With great care in its application no harm should come to the public interests. The courts having watch over the public as well as the private welfare will, it is confidently believed, refuse to extend the rule so as to endanger permanence of marriage.

Franklin G. Fessenden.

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